Swissport USA, Inc., *and* Miscellaneous Employees Union Local 781, International Brotherhood of Teamsters, Petitioner, and International Brotherhood of Teamsters, Local 705, Intervenor. Case 13–RC–21719

September 26, 2008

DECISION AND ORDER

BY CHAIRMAN SHAUMBER AND MEMBER LIEBMAN

On February 26, 2008,[1] the Petitioner filed a representation petition seeking to represent a unit of all full-time and regular part-time ramp agents, lead ramp agents, ground service equipment mechanics, lead ground service equipment mechanics, and ground service equipment mechanic helpers employed by the Employer at Chicago-O'Hare Airport (ORD) in Chicago, Illinois.[2] The Employer asserts that it is directly controlled by several common carriers subject to the jurisdiction of the Railway Labor Act (RLA) and that, therefore, the National Labor Relations Board (Board) lacks jurisdiction under Section 2(2) of the National Labor Relations Act. The Petitioner contends that the Board properly has jurisdiction over the Employer because the Employer stipulated to the Board's jurisdiction in two previous cases.[3] The Petitioner further argues that the Employer failed to establish that it is directly or indirectly controlled by common carriers subject to the RLA.

After a hearing on the jurisdiction issue, the Regional Director transferred the proceeding to the Board with the recommendation that the case be referred to the National Mediation Board (NMB). On April 11, the Board referred the case to NMB for a determination of whether the Employer's operations at ORD are within the jurisdiction of the RLA, rather than the National Labor Relations Act.

On July 2, the NMB issued an opinion letter finding that the Employer and its employees are subject to the RLA. *Swissport USA, Inc.*, 35 NMB No. 55 (2008). Specifically, the NMB used its two-pronged jurisdictional analysis to determine: (1) whether the Employer's work at ORD is traditionally performed by employees of air or rail carriers; and (2) whether a common carrier or carriers exercise direct or indirect ownership or control over the Employer at ORD. Applying this test, the NMB concluded that both prongs had been met, and that the Employer was subject to the RLA.

The case is now before the Board[4] on the issue of whether to defer to the NMB's opinion. On the entire record in this case, we find:

> The Employer is a Delaware corporation engaged in the business of providing ground support services to international and domestic airline carriers. At ORD, the Employer provides ramp services to between 12 and 16 international airline carriers. In the course of providing these services, the Employer's employees load and unload cargo and passenger baggage into and from aircraft at the airport, weigh and balance the cargo and baggage for outgoing flights, process passenger baggage, clean aircraft cabins, and de-ice aircraft in preparation for flight departures.

The record indicates that the carriers exercise substantial control over the Employer's ORD operations. Thus, the carriers dictate the type of training the Employer's employees must receive; employees hired by the Employer are assigned to carriers based on the carriers' flight schedules and service levels; carriers mandate specific performance requirements; many carriers require regular briefings and debriefings regarding daily performance issues; carriers have the right to request that the Employer remove specific employees from their account; the Employer uses the carriers' equipment and facilities; and at least one carrier agreement requires that the Employer provide carrier uniforms to the employees and that the employees appear to be employees of that carrier.

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor

[1] All dates are 2008 unless otherwise indicated.

[2] The petitioned-for unit excluded all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

[3] Specifically, on Oct. 1, 2004, the Employer stipulated to Board jurisdiction when the Board decertified the Transportation Workers Union of America, AFL–CIO, Air Transport Local 504 as the collective-bargaining representative of the Employer's ramp agents and ground service mechanics at ORD. On Jan. 26, 2006, the Employer stipulated to Board jurisdiction when the Board certified Local 705, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the Employer's ramp agents and ground service mechanics at ORD.

[4] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

Act." 29 U.S.C. § 152(3). The Railway Labor Act, as amended, applies to:

> Every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service.
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> 45 U.S.C. § 151 First and 181.

Here, the Board requested that the NMB study the record and determine the applicability of the RLA to the Employer. The NMB did so and issued an opinion finding that the Employer and its employees are subject to the RLA. At this juncture, whether the Board's referral of this case to the NMB for an initial determination was improvident under the circumstances is a moot issue. Having received the NMB's opinion, we will give it the substantial deference the Board ordinarily accords to NMB's opinions.[5]

Having considered the foregoing facts, in light of the opinion issued by the NMB, we find that the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the NMB pursuant to Section 201 of Title II of the Railway Labor Act. We shall therefore dismiss the petition.[6]

ORDER

It is ordered that the petition in Case 13–RC–21719 is dismissed.

Dated, Washington, D.C. September 26, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] See generally *DHL Worldwide Express*, 340 NLRB 1034 (2003).

[6] Member Liebman reluctantly concurs in the decision to dismiss the petition, notwithstanding the Board's holding in *United Parcel Service,* 318 NLRB 778, 780 (1995), that it will *not* refer the question of RLA coverage to the NMB in cases where (as here) the Board has previously exercised uncontested jurisdiction over the employer. In this case, the matter *was* referred, and the NMB has issued an opinion. Under the circumstances, the policy reasons for the Board's general practice of referral to the NMB, as expressed in *United Parcel Service*—"enabl[ing] the Board to obtain the NMB's expertise" and "minimiz[ing] the possibility of conflicting agency determinations"—counsel in favor of deferring to the NMB's opinion, even if precedent strongly suggests that the initial referral was erroneous.

In Chairman Schaumber's view, *United Parcel Service,* supra, does not compel Board jurisdiction in all circumstances where uncontested jurisdiction previously has been exercised over an employer. However, he agrees with his colleague that deference to the NMB's opinion is appropriate here.